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### FILED

## UNITED STATES DISTRICT COURT DEC 3 - 1997

NORTHERN DISTRICT OF CALIFORNIA W. WIEKING CLERK, U.S. DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

#### STATE OF CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Plaintiff,

No. C-97-2390 PJH

JUDGMENT

WITCO CORPORATION; and EXXON COMPANY, U.S.A. (a division of EXXON CORPORATION),

FILE COPY

Defendants.

The court having considered and granted the motion of plaintiff State of California Department of Toxic Substances Control for judicial approval of the settlement agreement and consent decree entered into between plaintiff and defendants Witco Corporation and Exxon Company, U.S.A.,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the consent decree is approved and shall be entered as a consent decree of the court, and judgment shall be entered thereon. The clerk is ordered to close the file.

Dated: December 3, 1997 21

United States Magistrate Judge

Copies mailed as noted on following page:

# United States District Court For the Northern District of California

1 2 3	Deputy Attorney General 2101 Webster Street, 12th Floor Oakland, CA 94612-3049
4 5	Witco Corporation, Law Department One American Lane
6 7 8	Deborah B. Gentry Exxon Company USA 3400 East Second Street Benicia, CA 94510-1087
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## FILED

DEC 3 - 1997 UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

## FILE COPY

#### STATE OF CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL

Plaintiff.

No. C-97-2390 PJH

ORDER GRANTING MOTION FOR ENTRY OF CONSENT DECREE

WITCO CORPORATION; and EXXON COMPANY, U/S.A. (a division of EXXON CORPORATION),

Defendants.

Plaintiff State of California Department of Toxic Substances Control ("DTSC") moves for entry of the proposed consent decree between DTSC and defendants Witco Corporation ("Witco") and Exxon Company, U.S.A. ("Exxon"), pursuant to the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. Having considered the parties' submissions and the comments filed by certain non-parties, and good cause appearing, the court finds the terms of the consent decree to be fair and reasonable, and in accord with the law as well as public policy. Accordingly, the court hereby GRANTS the motion and approves entry of the consent decree.

#### BACKGROUND

The parties seek the court's approval and entry as a consent decree, pursuant to section 113(f) of CERCLA, 42 U.S.C. § 9613(f), of the settlement agreement and consent decree entered between DTSC and defendants Witco and Exxon concerning liability for response costs and cleanup of the Bay Area Drum Site, a former drum reconditioning facility located at 1212 Third Avenue, San Francisco, California ("the property"). The consent decree will resolve DTSC's claims against Witco and Exxon for recovery of costs

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DTSC has incurred, and will incur in the future, in response to the release of hazardous substances at the property.1

Neither Witco nor Exxon ever owned the property or operated a drum reconditioning business there, but both companies shipped drums to the property for reconditioning. DTSC has documentation of more than 600,000 drums sent to the property for reconditioning; of this number, Witco was responsible for sending 200, and Exxon was responsible for sending 2,885. DTSC determined that Witco and Exxon were de minimis contributors of hazardous substances pursuant to 42 U.S.C. § 9622(g), in part because Witco's and Exxon's responsibility extends to only a minor portion (less than 1%) of the total number of drums sent to the site. DTSC calculated Witco's and Exxon's portions of the settlement amount at \$48,40 for each drum sent to the site.

On June 26, 1997, DTSC filed this action against Witco and Exxon for recovery of response costs under CERCLA. After the parties had agreed on the terms of the settlement, DTSC filed its motion for entry of the consent decree. DTSC served a copy of its motion, along with a copy of the court's scheduling order, on more than 300 persons and entities, including all the potential responsible parties ("PRPs") at the site. No person or entity filed an opposition to judicial approval of the consent decree. Nevertheless, a group calling itself the Bay Area Drum Concerned PRP Group ("the Group"), comprised of Aerojet-General Corporation, Ford Motor Company, and Great Western Chemical Company, filed a memorandum setting forth its concern over the actions taken by DTSC regarding other PRPs at the site. Specifically, the members of the Group assert that the methodology developed by DTSC to determine which PRPs would be eligible to enter into de minimis settlement agreements with DTSC excluded them from concluding such

<sup>&</sup>lt;sup>1</sup> According to DTSC, the property was operated as a drum reconditioning facility from approximately 1948 until approximately 1987. The various drum reconditioning businesses that operated at the property received drums containing residues of wastes and chemicals from a variety of sources. As part of the reconditioning process, the drums were flushed and recoated. Consequently, residual contents of the drums, as well as reconditioning chemicals, were released at the property, migrating to the groundwater under the property and the rest of the site. (The total area to which hazardous substances have been or may be released from the property is referred to as "the site.")

settlement agreements.2

#### DISCUSSION

#### Legal Standard A.

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"A consent decree is 'essentially a settlement agreement subject to continued judicial policing." United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) (citation omitted), cert. denied sub nom., Makah Indian Tribe v. United States, 501 U.S. 1250 (1991). Approval of a proposed consent decree is committed to the discretion of the district court. Id. The district court should enter the decree if it is fair, reasonable, and equitable, and does not violate the law or public policy. Id. Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); see also United States v. Conservation Chemical Co., 628 F.Supp. 391, 400 (W.D. Mo. 1985) (citing <u>United States</u> v. Seymour Recycling Corp., 554 F.Supp. 1334 (S.D. Ind. 1982)). Because the court's approval "is nothing more that 'an amalgam of delicate balancing, gross approximations, and rough justice." however, "the court need only be satisfied that the decree represents a 'reasonable factual and legal determination." United States v. Oregon, 913 F.2d at 581 (citations omitted).

The court's discretion is to be exercised in light of the strong policy favoring voluntary settlement of litigation, see Ahern v. Central Pacific Freight Lines, 846 F.2d 47, 49 (9th Cir. 1988) ("Settlement agreements conserve judicial time and limit expensive litigation"), and in particular, in accord with CERCLA's express policy of encouraging early settlements. See United States v. Montrose Chemical Corp. of California, 50 F.3d 741, 746 (9th Cir. 1995). The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by a governmental agency specially equipped, trained, or oriented in the field. Conservation Law Foundation of New England, Inc. v.

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<sup>&</sup>lt;sup>2</sup> A second group, the Bay Area Drum Ad Hoc PRP Group, consisting of 63 companies and one public entity that DTSC has identified as PRPs at the site, also filed a statement of nonopposition to judicial approval of the consent decree. In addition, this group identified three factual assertions in DTSC's moving papers with which it disagreed. Because none of these assertions bears on the court's decision to approve the settlement between the parties herein, the court does not address this second group's concerns in this order.

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Franklin, 989 F. 2d 54, 58 (1st Cir. 1993); see also Montrose, 50 F.3d at 746 ("CERCLA's policy of encouraging early settlements is strengthened when a government agency charged with protecting the public interest 'has pulled the laboring oar in constructing the proposed settlement." (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990))).

In applying the standard set forth above to cases brought under CERCLA, courts should consider the following criteria: 1) fidelity to CERCLA, 2) procedural fairness, 3) substantive fairness, and 4) reasonableness. See Cannons, 899 F.2d at 85-93.

#### B. DTSC's Motion for Entry of Consent Decree

The court finds that the terms of the proposed decree are consistent with the purposes of CERCLA, and that the settlement is both fair and reasonable. First, the agreement is harmonious with the intent of Congress that claims against de minimis contributors to hazardous waste sites be resolved as early and as quickly as possible. CERCLA explicitly authorizes the United States Environmental Protection Agency ("EPA") to conclude a de minimis settlement agreement with a site PRP where the amount of hazardous substances contributed by the PRP to the site are minimal in comparison with the total hazardous substances at the site. 42 U.S.C. § 9622(g)(1)(A). Indeed, the EPA is required to conclude such an agreement "as promptly as possible," whenever practicable and in the public interest, if the settlement involves only a minor portion of the response costs at the site. Id. Here, applying EPA guidance and policy, DTSC concluded that the amounts and effects of the hazardous substances contributed by Witco and Exxon to the site are minimal in comparison with the total amount of hazardous substances at the site, and that the money these two defendants will be required to pay represents a minor portion of the response costs likely to be incurred in connection with cleaning up the site. Under these circumstances, CERCLA favors the rapid conclusion of a de minimis settlement, and the settlement agreement is thus consistent with the purposes of CERCLA as set forth in 42 U.S.C. § 9622(g).

Second, the settlement is fair. Courts examine both the procedural and substantive

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fairness of consent decrees. To determine procedural fairness, a court should look to the negotiation process and "attempt to gauge its candor, openness, and balancing power." Arizona v. Nucor Corp., 825 F. Supp. 1452, 1456 (D. Ariz. 1992) (quoting Cannons, 899) F.2d at 84). In this case, the settlement agreement between DTSC and Witco and Exxon resulted from arms-length negotiations over a period of some months, during which time each party was represented by counsel. DTSC's investigation of the presence of hazardous substances in the soils and groundwater at the site began in 1982. In the course of its investigation, DTSC obtained documentation of the sources of more than 600,000 drums sent to the property for reconditioning. In 1995, several site PRPs approached DTSC seeking to resolve any liability they might have in connection with the site by negotiating a de minimis waste contributor settlement agreement with DTSC along the lines of the de minimis settlement agreements negotiated by the EPA pursuant to CERCLA, 42 U.S.C. § 9622(g)(1)(A). After meeting with these PRPs, DTSC determined that it would negotiate an appropriate form of consent agreement with any PRP that met DTSC's eligibility requirements and that would accept DTSC's settlement terms. DTSC then developed the terms set forth in the consent decree by following relevant EPA guidance documents and practice, as fully described in the Declaration of Barbara J. Cook, P.E., in Support of Motion for Judicial Approval of Settlement Agreement and Consent Decree, filed herein on July 23, 1997, at paragraphs 11 and 12.

The court finds that the settlement terms set forth in the consent decree were calculated by DTSC in an objective manner, based upon its estimate of the total cost of investigating and cleaning up the site. The court finds further that DTSC's procedure for determining the settlement amount was objective, as was the procedure for determining the total number of drums sent to the site by Witco and Exxon. Moreover, the evidence submitted by DTSC shows that DTSC offered the terms memorialized in the consent decree to each site PRP for which DTSC had no evidence of drum shipments exceeding 6000 drums.

The members of the Bay Area Drum Concerned PRP Group complain that the

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methodology developed by DTSC to determine which PRPs would be eligible to conclude de minimis settlements with DTSC unfairly excluded them from concluding such settlement agreements. In particular, the Group contends that DTSC has "arbitrarily assign[ed] responsibility to PRPs while denying procedural due process to the PRPs, thereby preventing those PRPs from availing themselves of the same de minimis opportunity." Memorandum of Points and Authorities of the Bay Area Drum Concerned PRP Group, filed herein on September 30, 1997, at ¶ 3. The Group argues that DTSC "should be required to treat PRPs to this site in a reasonable and fair manner consistent with CERCLA," and petitions the court to "direct DTSC to make Jack Hamilton available for questioning by all the PRPs to this site."3 Id.

The concerns expressed by the Group regarding DTSC's methodology for determining eligibility for inclusion in a de minimis settlement agreement do not, however, constitute an objection to judicial approval of this particular agreement. The court is concerned here with the procedural fairness of the agreement between DTSC and Witco and Exxon, and for the reasons stated above, finds the agreement to be procedurally fair. Since claims against Aerojet-General Corporation, Ford Motor Company, and Great Western Chemical Co. were not pleaded in this case, any claims by those companies that they have been denied procedural due process are not properly before the court and are not implicated in this consent decree.

The court also finds the agreement to be substantively fair. Substantive fairness invokes "corrective justice and accountability issues: a party should bear the cost of the harm for which it is legally responsible." Cannons, 899 F.2d at 87. Where liability must be allocated among numerous defendants, the court must scrutinize a proposed consent decree to determine whether the estimates of responsibility and damages were fairly

<sup>3</sup> The group does not identify Jack Hamilton, other than to refer to him as a source for some of DTSC's information about the number of drums sent to the site by Aerojet-General Corporation, one of the members of the Group. As DTSC explains, however, Hamilton is neither an employee nor a contractor of DTSC, but rather, is a third-party witness. As such, he may be contacted directly for an interview by any interested entity or individual, without any judicial action.

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proportioned among the settling defendants. Id. at 87-89; see also Montrose, 50 F.3d at 747 ("In assessing substantive fairness, courts "compare the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then ... factor into the equation any reasonable discounts for litigation risks, time savings, and the like that may be justified.")

In this case, Witco and Exxon will pay DTSC more than twice their proportionate shares of the estimated cost of investigating the site, calculated upon the addition of a base figure to EPA-recommended premium amounts to account for potential risk.4 The court finds that the even-handed application of this EPA-approved methodology results in settlement terms that are substantively fair.

Finally, the court finds that the consent decree is reasonable. In considering the reasonableness of the agreement, the court should consider both the efficacy of the settlement in compensating the public for actual and anticipated remedial response costs and the relative strength of the parties' litigation positions. Cannons, 899 F.2d at 89-90. Because the adequacy of those remedies can be an "enormously complex" subject, the court need not assess whether the government made the best possible settlement, and "the agency cannot realistically be held to a standard of mathematical precision. If the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise." Id. at 90; see also Nucor, 825 F. Supp. at 1464) (court's role is not to determine whether the agreement is the best possible settlement the state could have achieved, but rather whether the settlement is within the reaches of the public interest).

Here, no objection having been raised regarding the efficacy of DTSC's proposed cleanup, the court defers to DTSC's estimate of the amount required to satisfactorily

<sup>&</sup>lt;sup>4</sup> DTSC estimates its total cost of investigation and clean-up to be \$13,2 million. This figure divided by the total number of drums for which it has written drum shipment documentation (just over 600,000 drums) equals \$22 per drum. DTSC then augmented the base figure by 120%, to reflect the risk that DTSC would assume by settling with de minimis site PRPs before the site was fully investigated. Thus, the amount of the per-drum payment to be provided for in any de minimis settlement agreement, including the one at issue here, is \$48.40.

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compensate the public for the actual and anticipated costs of remedial and response measures. In addition, the court finds that DTSC has utilized a reasonable and objective methodology in its calculation of the settlement amount of the de minimis settlements related to the site in question. As for the relative strength of the parties' bargaining positions, the court notes that any settlement agreement should take into account foreseeable risk of loss as shown by the sturdiness of the government's case against the defendants. See Cannons, 899 F.2d at 90. In this case, DTSC has accounted for the risk factor by incorporating the recommended EPA premia to increase the payment per drum 120%, from the projected actual cleanup cost of \$22.00 to \$48.40.

#### CONCLUSION

In accordance with the foregoing, the court finds that the proposed consent decree is fair and reasonable, and that it furthers the goals of CERCLA. The motion of DTSC for judicial approval of the consent decree is hereby GRANTED. Counsel for DTSC shall serve a copy of this order and a copy of the consent decree, signed on the date of this order, on all individuals and entities listed in the service list attached to its proof of service of the moving papers.

J. HAMIL

United States Magistrate Judge

#### IT IS SO ORDERED.

Dated: December 3, 1997

21 Copies mailed as noted below:

22 Kevin James Deputy Attorney General 23 2101 Webster Street, 12th Floor Oakland, CA 94612-3049

24 James A. Nortz<sup>.</sup> 25 Witco Corporation, Law Department One American Lane 26 Greenwich, CT 06831-2559

Deborah B. Gentry Exxon Company USA 28 3400 East Second Street Benicia, CA 94510-1087

# ORIGINAL

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3	THEODORA BERGER, Cal. State Bar No. 050108  Assistant Attorney General  KEVIN JAMES, Cal. State Bar No. 111103  DEC 3 - 1997
4	Deputy Attorney General  2101 Webster Street, 12th Floor  RICHARD W. WIEKING CLERK, U.S. DISTRICT COURT AND THE PARTY OF CALLED PANIA
5	Oakland, California 94612-3049 Telephone: (510) 286-4123
6	Attorneys for Plaintiff State of California Department of Toxic Substances Control
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8	JAMES A. NORTZ, Penn. State Bar No. 46459
9 Witco Corporation, Law Department	
10	Greenwich, Connecticut 06831-2559
11	Attorney For Defendant Witco Corporation
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13	DEBORAH B. GENTRY, Cal. State Bar No. 146750 Exxon Company, U.S.A.
14	3400 East Second Street Benicia, California 94510-1097
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16	Attorney for Defendant Exxon Company, U.S.A., a division of Exxon Corporation
17	
18	UNITED STATES DISTRICT COURT
19	NORTHERN DISTRICT OF CALIFORNIA
20	
21	STATE OF CALIFORNIA DEPARTMENT OF ) No. C 97-2390 PJH TOXIC SUBSTANCES CONTROL,
22	) SETTLEMENT AGREEMENT AND Plaintiff, ) CONSENT DECREE
23	v. CONSENT DECKEE
24	WITCO CORPORATION; and EXXON ) COMPANY, U.S.A. (a division of )
25	EXXON CORPORATION),
26	Defendants.
27	/

#### 1. <u>INTRODUCTION</u>

Department of Toxic Substances Control ("DTSC") filed a Complaint ("the Complaint") in the United States District Court for the Northern District of California (the "Court"), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., against Witco Corporation ("Witco") and Exxon Company, U.S.A. ("Exxon"), a division of Exxon Corporation (hereafter referred to collectively as the "Settling Defendants"). DTSC and the Settling Defendants now enter into this Settlement Agreement and Consent Decree (the "Agreement") in order to settle that action on the terms and conditions set forth below.

1.2 The Complaint alleges that the Settling Defendants sent hazardous substances to 1212 Thomas Avenue, San Francisco, California (the "Property") for treatment and/or disposal. A legal description of the Property is attached hereto as Exhibit A and is incorporated herein by this reference. The Complaint further alleges that said hazardous substances, among others, were released, or threatened to be released, at and from the Property to the soil of the Property, to the soil of adjacent parcels of land, and to groundwater beneath and migrating from the Property. The total area to which hazardous substances have been released, or threatened to be released, at and from the Property is referred to in this Agreement as the "Site." The Complaint alleges that DTSC, and its predecessor, the Toxic Substances Control Program of the California Department of Health

Services ("DHS"), incurred costs, and that DTSC will continue to incur costs, in response to the release and threatened release of hazardous substances at the Site, and seeks to recover those costs, jointly and severally, from the Settling Defendants.

- 1.3 The Director of DTSC, or his designee, has determined that:
- 1.3.1 prompt settlement with each Settling
  Defendant is practicable and in the public interest;
- 1.3.2 the payment to be made by each Settling
  Defendant under this Consent Decree involves only a minor portion
  of the costs that have been incurred, and will be incurred, in
  response to the release and threatened release of hazardous
  substances at the Site, based upon DTSC's estimate that the total
  costs incurred and to be incurred in response to said release and
  threatened release by DHS, by DTSC and by private parties is
  \$13,200,000; and
- 1.3.3 the amount of hazardous substances contributed to the Site by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant are minimal in comparison to other hazardous substances at the Site. This is because the amount of hazardous substances contributed to the Site by each Settling Defendant does not exceed 1% of the hazardous substances at the Site, and the hazardous substances contributed by each Settling Defendant to the Site are not significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site.

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or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to the Settling Defendants.

On March 14, 1996, DTSC issued a Consent Order 1.5 (the "Consent Order"), No. HSA 95/96-060, to more than fifty parties, including Exxon. By signing the Consent Order, Exxon agreed--along with more than fifty other parties--to perform certain environmental removal activities at and for the Site, under DTSC supervision. By entering into this Agreement, DTSC and Exxon intend fully and completely to settle among other things Exxon's obligations under the Consent Order, as more fully set forth in paragraph 6.4, below. DTSC and Exxon agree that the full and complete settlement of Exxon's obligations under the Consent Order is appropriate in view of the findings made by the Director of DTSC, or his designee, set forth in paragraph 1.3, above, and in order to fully and completely settle claims for relief and causes of action held by DTSC against Exxon with respect to the matters set forth in paragraph 5.1 of this Agreement.

DTSC and the Settling Defendants agree that

#### 2. . DEFINITIONS

- All terms used in this Agreement that are defined in section 101 of CERCLA, 42 U.S.C. § 9601, shall have the definitions set forth in that section.
- The term "Response Costs", as used in this Agreement, shall include all removal or remedial costs, including

but not limited to direct labor costs, contractor costs, travel expenses, indirect costs, oversight costs, applicable interest charges and attorneys' fees, incurred in response to the release and threatened release of hazardous substances at the Site.

#### 3. JURISDICTION

DTSC and the Settling Defendants agree that the Court has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction over DTSC and each of the Settling Defendants. DTSC and the Settling Defendants expressly recognize that the Court has the authority to enter this Agreement as a consent decree of the Court. Upon entry of this Agreement as a consent decree of the Court, the Settling Defendants waive their right to a trial on the allegations of the Complaint.

#### 4. SETTLEMENT OF DISPUTED CLAIMS

- 4.1 This Agreement was negotiated and executed by DTSC and the Settling Defendants in good faith to avoid prolonged and complicated litigation and to further the public interest.
- 4.2 This Agreement represents a fair, reasonable and equitable settlement of the matters addressed herein. For the purposes of this Agreement, the Settling Defendants admit none of the allegations of the Complaint, nor do the Settling Defendants admit any liability to DTSC arising out of the transactions or occurrences alleged in the Complaint. Nothing in the Agreement is intended or shall be construed as an admission by any of the Settling Defendants of any violation of law or of any issue of law or fact, nor, except as expressly set forth herein, shall

anything in the Agreement prejudice, waive, or impair any right, remedy or defense that any of the Settling Defendants may have in any other or further legal proceeding. In entering into this Agreement, the Settling Defendants reserve any claims or rights of contribution they may have against non-parties to this Agreement.

#### 5. MATTERS COVERED BY THIS AGREEMENT

Except as provided in section 8, below, this Agreement fully and completely settles any and all claims for relief or causes of action held by DTSC against any of the Settling Defendants, pursuant to statute or common law, 1) the recovery of any Response Costs incurred, or to be incurred, by DHS or DTSC; and 2) for the performance of removal or remedial activities in response to the release or threatened release of hazardous substances at the Site. This Agreement does not settle, conclude or otherwise affect any other claim for relief or cause of action made or asserted, or which may be made or asserted, against any of the Settling Defendants, by DTSC. This Agreement does not settle, conclude or otherwise affect any claim for relief or cause of action made or asserted, or which may be made or asserted, against any of the Settling Defendants, by any agency of the State of California other than DTSC, or by any federal or local governmental agency. This settlement is expressly conditioned on full and complete performance by the Settling Defendants of the terms and conditions of this Agreement.

5.2 The Settling Defendants hereby waive any claim for

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5.3 Each of the Settling Defendants reserves all of its rights and defenses to any claim for relief or cause of action not settled, concluded or otherwise affected by this Agreement, except for any defense that any such claim for relief or cause of action is barred by operation of this Agreement and except as set forth in paragraph 8.4, below.

#### 6. BASIC SETTLEMENT

6.1 In settlement of the claims for relief and causes of action described in paragraph 5.1 of this Agreement, each Settling Defendant shall pay to DTSC, within thirty (30) days of entry of this Agreement as a Consent Decree of the Court, the amount set forth below:

Witco Corporation \$ 9,680.00 Exxon Company, U.S.A. \$139,634.00

1.0

6.2 Each Settling Defendant's payment includes an amount for: a) past Response Costs; b) projected future Response Costs; and c) a premium to cover the risks and uncertainties associated with this settlement including, but not limited to, the risk that total Response Costs incurred by DHS, by DTSC, or by any private party, will exceed the estimated total Response Costs upon which Settling Defendants' payments are

based.

6.3 Each payment required by paragraph 6.1 of this Agreement shall be made by cashiers' or certified check, made payable to Cashier, California Department of Toxic Substances Control, and shall bear on its face both the docket number of this action and the phrase "Site code 200011." Each payment shall be mailed to:

Department of Toxic Substances Control Accounting Unit P.O. Box 942732 Sacramento, CA 94234-7320

A copy of each payment check shall also be mailed to:

Barbara J. Cook, P.E. Department of Toxic Substances Control Region Two 700 Heinz St., Bldg. F Berkeley, CA 94710

hundred thirty-nine thousand six hundred thirty-four dollars (\$139,634.00) pursuant to paragraph 6.1, above, DTSC shall withdraw, as against Exxon, the Consent Order. DTSC shall serve counsel for Exxon (as identified in the caption of this Agreement) with a copy of its withdrawal of the Consent Order, as against Exxon. Exxon's full and complete performance of the terms and conditions of this Agreement shall stand in lieu of any obligation on Exxon's part to perform the environmental removal activities required by the Consent Order.

6.5 Each party to this Agreement shall bear the litigation costs and attorneys' fees it has incurred in connection with this case.

#### 7. CERTIFICATIONS OF SETTLING DEFENDANTS

By signing this Consent Decree, each Settling Defendant certifies, under penalty of perjury, that to the best of its knowledge and ability, it has:

- 7.1 conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to DTSC all information currently in its possession, or in the possession of its officers, directors, employees, contractors (excluding any Site owner or operator) or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at, to, or in connection with the Site;
- 7.2 not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site since being notified of its potential liability for the Response Costs that DHS and DTSC have incurred, and that DTSC will in the future incur; and
- 7.3 fully complied with any and all DTSC requests for information regarding the Site pursuant to California Health and Safety Code section 25358.1.

#### 8. RESERVATIONS OF RIGHTS

8.1 Except as expressly provided elsewhere in this Agreement, nothing in this Agreement is intended nor shall be construed to preclude DTSC from exercising its authority under any law, statute or regulation. Moreover, nothing in this

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- Notwithstanding any other provision of this Agreement, DTSC reserves the right to institute proceedings in this action, or in a new action, against any individual Settling Defendant, seeking further reimbursement of Response Costs, or seeking to compel said Settling Defendant to perform removal or remedial actions in response to the release or threatened release of hazardous substances at the Site, if:
  - information is discovered that indicates that the (a) Settling Defendant contributed hazardous substances to the Site which were significantly more toxic or of significantly greater hazardous effect than other hazardous substances at the Site, or
  - information is discovered that indicates that the (b) Settling Defendant sent more drums containing hazardous substances or hazardous substance residues to the Property, between 1948 and 1987 (inclusive), than set forth below:

Witco Corporation 200 drums Exxon Company, U.S.A. 2885 drums

8.3 Notwithstanding any other provision of this 24

Agreement, this Agreement does not settle or otherwise affect any claim for relief or cause of action held by DTSC against any of the Settling Defendants for the recovery of Response Costs, or

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for the performance of removal or remedial activities in response to any release or threatened release of hazardous substances at the Site, based upon the Settling Defendant's ownership or operation of real property at or adjacent to the Site, or upon any shipment by the Settling Defendant of hazardous substances or hazardous substance residues to the Site on or after January 1, 1988.

In any subsequent judicial proceeding initiated by DTSC for injunctive relief, recovery of response costs, or other relief relating to the Site, as permitted under paragraph 8.2, the Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, or claimsplitting, or any other defense based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this section shall affect the full and complete settlement of claims for relief and causes of action effected by paragraph 5.1 and that nothing in this section shall affect defenses or claims that any of the Settling Defendants may assert against any agency, department, board or entity of the State of California other than DTSC, or any federal or local governmental agency.

#### 9. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

9.1 Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Agreement. Except as set forth in paragraph

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5.2 of this Agreement, DTSC and the Settling Defendants each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that each may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

9.2 DTSC and the Settling Defendants agree and, by entering this Agreement as a consent decree of the Court, the Court finds, that each Settling Defendant is entitled, as of the date of entry of this Agreement as a consent decree of the Court, to protection from contribution actions or claims as provided by section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all actions taken and to be taken by DHS, by DTSC and by private parties in response to the release and threatened release of hazardous substances at the Site, and all Response Costs incurred and to be incurred by DHS, by DTSC and by private parties.

#### 10. MODIFICATION OF AGREEMENT

This Agreement may only be modified upon the written approval of all the parties hereto and the Court.

#### 11. APPLICATION OF AGREEMENT

This Agreement shall apply to and be binding upon DTSC and the Settling Defendants, and shall inure to the benefit of each of them and their successors and assigns.

#### 12. AUTHORITY TO ENTER

Each signatory to this Agreement certifies that he or

she is fully authorized by the party he or she represents to 1 2 enter into this Agreement, to execute it on behalf of the party represented and legally to bind that party. 3 13. INTEGRATION 4 This Agreement, and the exhibits hereto, constitute the 5 entire agreement among the parties and may not be amended or 6 supplemented except as provided for herein. 7 RETENTION OF JURISDICTION 8 14. DTSC and the Settling Defendants agree that the Court 9 shall retain jurisdiction of this Agreement and shall have the 1.0 authority to implement and enforce its terms and conditions, and 11 to resolve any disputes regarding its provisions. 12 15. EXECUTION OF AGREEMENT 13 This Agreement may be executed in several counterpart 14 originals, each of which shall be deemed an original, but all of 15 which together shall constitute one and the same instrument. 16 APPROVALS OF PARTIES 17 DTSC, on behalf of itself and as successor in interest 18 to DHS, consents to this Agreement by its duly authorized 19 20 representative as follows: 21 STATE OF CALIFORNIA DEPARTMENT OF 22 TOXIC SUBSTANCES CONTROL 23 Dated: July 17, 1997 24 By: Chief, Site Mitigation Branch 25 State of California Department of

SETTLEMENT AGREEMENT & CONSENT DECREE Case No. C 97-2390 PJH

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Toxic Substances Control

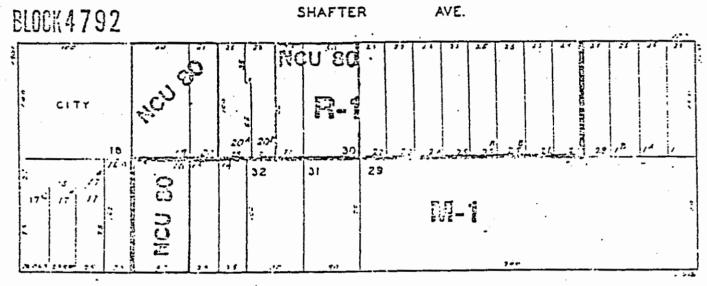
1	Approved as to form:
2	Dated: 7/16/97  DANIEL E. LUNGREN, Attorney General of the State of California THEODORA BERGER
4	Assistant Attorney General
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6	By: Llux fluel KEVIN JAMES
7	Deputy Attorney General
8	Attorneys for Plaintiff State of California Department of Toxic Substances Control
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11	Witco Corporation consents to this Agreement through
12	its duly authorized representative as follows:
13	Dated: 11/18/96 WITCO CORPORATION
14	By: Cutat Mi- Cy
15	Its: Vice President, General Counsel and
16	Corporate Secretary
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18	Approved as to form:
19	Dated: 11/18/96
20	By:
21	JAMES A. NORTZ Senior Attorney
22	Attorney for Defendant
23	Witco Corporation
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25	///
26	///
27	///
	SETTLEMENT AGREEMENT & CONSENT DECREE

Case No. C 97-2390 PJH

1	Exxon Company, U.S.A., a division of Exxon Corporation
2	consents to this Agreement through its duly authorized
3	representative as follows:
4	Dated: 6/20/17 EXXON COMPANY, U.S.A., a division of EXXON CORPORATION
5	By: Tuchard J. Marcon .
6	By: Culture . Maier
7	Its: <u>Benicia Refinery Manager</u>
8	• •
9	Approved as to form:
10	Dated: June 20,1997
11	By: Deharah B. Gentry
12	DEBORAH B. GENTRY  Refinery Attorney
13	Attorney for Defendant Exxon
14	Company, U.S.A., a division of Exxon Corporation
15	-
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17	IT IS SO ORDERED, ADJUDGED AND DECREED:
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19	Dated: 12/3/97 U.S. DISTRICT COURT JUDGE
20	PHYLLIS J. HAMILTON UNITED STATES MAGISTRATE JUDGE
21	UNITED GLATED ENGISTRATE SOSSE
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23	KJ:pam
24	C:\KEVIN\WITCO.STL
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#### Exhibit A

Legal Description of the Property: "Beginning at the point of intersection of the northeasterly line of Thomas Avenue and the northwesterly line of Hawes Street; running thence northwesterly and along said line of Thomas Avenue 300 feet; thence at a right angle northeasterly 100 feet; thence at a right angle southeasterly 300 feet to the northwesterly line of Hawes Street; and thence at a right angle southwesterly along said line of Hawes Street 100 feet to the point of beginning."



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HAWES